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**QUESTION PRESENTED**

Whether a plaintiff who obtains a judgment for nominal damages thereby is entitled to "prevailing party" status under 42 U.S.C. § 1988, without regard to whether he otherwise meets the Court's definition of a "prevailing party."

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1991

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No. 91-990

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DALE FARRAR, *et al.*,  
Petitioners,  
v.

WILLIAM HOBBY,  
Respondent.

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit

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BRIEF OF THE WASHINGTON LEGAL  
FOUNDATION, U.S. REPRESENTATIVES  
HENRY HYDE AND JOE BARTON, AND  
THE ALLIED EDUCATIONAL FOUNDATION AS  
*AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial percentage of its resources to advancing the interests of the free enterprise system. To this end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in cases affecting business.

WLF believes that our nation's free enterprise system has suffered greatly in recent decades as a result of the litigation explosion that has clogged both state and federal courts and that the proliferation of federal statutes providing for awards of attorney fees to "prevailing" plaintiffs in certain classes of cases (particularly environmental and civil rights cases) -- as well as court decisions construing the term "prevailing" plaintiff too liberally -- have contributed significantly to that trend. While WLF fully supports enforcement of our nation's environmental and civil rights laws, WLF believes that the chief results of providing an overly-liberal definition of "prevailing" plaintiffs in environmental and civil rights cases have been to line the pockets of the nation's lawyers at the expense of taxpayers and to increase the quantity of unmeritorious lawsuits clogging our courts.

Rep. Henry Hyde (R-Ill.) and Joe Barton (R-Tex.) are members of the U.S. House of Representatives. Both are concerned that the congressional statute at issue in this case, 42 U.S.C. § 1988, not be interpreted to provide for attorney fee awards to plaintiffs who have not "prevailed" in any meaningful sense and whom Congress thus never intended to subsidize. Both believe that taxpayers in Texas and elsewhere should not be forced to pay the fees of lawyers who have accomplished nothing in their suits against the government.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in the federal courts on a number of occasions. AEF believes that the public interest is best served by a legal system that does not overcompensate lawyers and does not provide too many incentives for the filing of lawsuits.

*Amici* are particularly eager to file their brief in order to dispel any notion -- that might arise due to the filing of an *amicus* brief by the American Bar Association on behalf

of Petitioner -- that lawyers as a group support a liberal definition of "prevailing" plaintiffs within the meaning of federal fee-shifting statutes. Many lawyers, including those at WLF, share the public's distaste for the large fees often awarded under those statutes to attorneys who have not accomplished much of anything. Indeed, WLF has had a policy of never seeking an award of attorney fees as the prevailing party in litigation.

Both WLF and AEF appeared as *amici* in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991)(*en banc*), and again in *City of Burlington v. Dague*, No. 91-810, *cert. granted*, 112 S. Ct. 964 (1992), arguing that attorney fees awarded under federal fee-shifting statutes should not be enhanced to compensate the plaintiff's attorney for assuming the risk of nonrecovery. Neither WLF, AEF, nor either Rep. Hyde or Rep. Barton has any financial interest in the outcome of this case, and thus they can assist the Court by providing a perspective that is distinct from that of either party.

*Amici* submit this brief on behalf of Respondent with the written consent of both parties. The written consents are on file with the Clerk of the Court.

### STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case set forth in Respondent's brief.

In brief, in the 1970s Petitioner Dale L. Farrar and his father, Joseph D. Farrar, owned and operated Artesia Hall, a school in Liberty County, Texas for the care of delinquent, handicapped, or disturbed teenage boys and girls. The death of an Artesia Hall student led to an investigation of the school by state officials and to Joseph Farrar's criminal indictment in 1973 for willful failure to provide proper medical treatment and timely hospitalization for the deceased. Although the criminal charges were later

dropped, Texas state officials were able to obtain a court injunction requiring the closure of Artesia Hall.

In 1975, Joseph Farrar filed suit against a number a Texas State officials, including Respondent William Hobby (who was then the Lieutenant Governor of Texas), alleging that the officials had participated in a conspiracy to deprive him of his civil rights by pushing for Artesia Hall's closure.<sup>1</sup> By the time the case went to trial in 1983, Petitioners had dropped all claims for injunctive relief but were seeking \$17 million in damages.

The case went to the jury on special interrogatories. The jury completely exonerated all respondents other than Respondent Hobby. The jury then found, in answer to interrogatories, that Lt. Governor Hobby "had committed an act . . . that deprived Plaintiff Joseph Farrar of a civil right" in connection with the closure of Artesia Hall<sup>2</sup> but that Hobby's actions were not a "proximate cause" of any damages suffered by Joseph Farrar. Accordingly, the jury awarded no damages to the Farrars. On appeal, the United States Court of Appeals for the Fifth Circuit rejected most of Petitioners' claims but did hold that in light of the jury's finding that Hobby had violated one of Joseph Farrar's civil rights, Petitioners were entitled to an award of \$1 in nominal damages.

Petitioners then sought an award of attorney fees under 42 U.S.C. § 1988, arguing that the award of \$1 in nominal damages was sufficient to make them "prevailing

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<sup>1</sup> The complaint was later amended to add Petitioner Dale Farrar as a plaintiff. After Joseph Farrar's death in 1983, Dale Farrar and Petitioner Patricia Smith (as Co-Administrators of Joseph Farrar's estate) were substituted as plaintiffs for Joseph Farrar.

<sup>2</sup> The jury's interrogatory answers merely stated "Yes" in response to an inquiry regarding whether one of Joseph Farrar's civil rights had been violated, and they provided no details of what the violation (which the jury found did not injure Joseph Farrar) might have consisted.

parties" within the meaning of that statute. The district court agreed, and awarded Petitioners \$280,000 in fees, \$28,000 in expenses, and prejudgment interest. The Fifth Circuit reversed, finding that Petitioners were not "prevailing parties" within the meaning of 42 U.S.C. § 1988.<sup>3</sup> Petitioners have sought review of that decision in this Court.

## SUMMARY OF ARGUMENT

Petitioners are asking the wrong question in this lawsuit. They ask whether a plaintiff who has obtained a nominal damages award is entitled to "prevailing party" status within the meaning of 42 U.S.C. § 1988, and they answer their question in the affirmative. Petitioners undoubtedly are correct that some plaintiffs who obtain no relief other than nominal damages will qualify as prevailing parties, but whether they qualify bears little relation to the type of judgment they received.

In order to qualify as a "prevailing party" under 42 U.S.C. § 1988, a plaintiff must meet the two standards set forth in *Texas State Teachers Assn. v. Garland Independent School District*, 489 U.S. 782, 109 S. Ct. 1486 (1989): (1) whether the plaintiff can point to a resolution of the dispute which changes the legal relationship between him and the defendant; and (2)

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<sup>3</sup> Section 1988 provides, in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the *prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (emphasis added). Because the Fifth Circuit held that Petitioners were not prevailing parties within the meaning of § 1988, it had no occasion to consider whether an award of more than \$300,000 in fees and expenses to parties who had succeeded in establishing entitlement to only \$1 of the \$17 million in damages they had sought constituted a "reasonable attorney's fee."

whether the plaintiff can show that his success on a legal claim is not "so insignificant" as to be characterized as "purely technical" or "*de minimis*." *Garland*, 109 S. Ct. at 1493.

Petitioners plainly fail to meet that standard in this case. The nominal damages award in this suit afforded Petitioners no relief whatsoever. They did not obtain an order permitting the reopening of Artesia Hall or enjoining state officials from interfering with operations of the school in the future. They did not obtain a declaratory judgment that state officials acted wrongly toward them. Nothing in the judgment suggests that the jury can be said to have cleared the Farrar family name from allegations that led to Artesia Hall's closure. No state officials will be able to look to this case for guidance regarding how they should deal with youth home operators accused of serious wrongdoing, because nothing in the jury's interrogatory answers specifies how Mr. Hobby may have wronged Petitioners. That failure to provide guidance, when coupled with the jury's determination that Mr. Hobby did nothing that caused quantifiable damages to Petitioners, makes clear that any success attained by Petitioners in this case can fairly be described as "purely technical" or "*de minimis*."

Congress did not intend to confer "prevailing party" status on every plaintiff who establishes a constitutional violation. Both *Garland* and *Rhodes v. Stewart*, 488 U.S. 1 (1988), make clear that regardless whether a proven infraction reaches constitutional dimension, "prevailing party" status will be conferred only on those plaintiffs that can meet the standards set forth in *Garland*.

Petitioners have only themselves to blame for obtaining an essentially meaningless judgment. Had their purpose been to achieve vindication of a constitutional principle without regard to the number of dollars at stake, they could have filed a complaint that explicitly sought nominal damages and/or declaratory relief. In that event, interrogatories could have been submitted to the jury that

would have provided the jury with an opportunity to express which of Petitioners' civil rights, if any, it believed were violated by Mr. Hobby. Instead, Petitioners sought only monetary damages, and that claim was flat-out rejected by the jury; Petitioners were left with nothing but an opaque nominal damages judgment that was essentially meaningless. Petitioners should not be heard to complain about the denial of their "prevailing party" claim when the reason for that denial -- failure to obtain any meaningful relief -- may well have been a direct result of their failure to seek either nominal damages or declaratory judgment.

## ARGUMENT

### I. PETITIONERS ARE NOT "PREVAILING PARTIES" BECAUSE THEIR LAWSUIT FAILED TO ALTER MATERIALLY THE RELATIONSHIP BETWEEN THEM AND RESPONDENT HOBBY

#### A. Petitioners Are Focusing on the Wrong Issue in Pointing to Their Recovery of Nominal Damages

Petitioners have phrased the Question Presented in this case as follows: "Does 42 U.S.C. § 1988 authorize the award of reasonable attorney's fees to civil rights plaintiffs who recover nominal damages?" Petition for Writ of Certiorari at i. The answer to that question quite clearly is yes: there are circumstances under which a civil rights plaintiff who recovers only nominal damages may nonetheless be entitled to an award of attorney fees under 42 U.S.C. § 1988. But the answer to that question does not begin to answer the question whether Petitioners are entitled to an attorney fee award in *this* case. Whether a plaintiff has recovered nominal damages is not a relevant issue under the standards established by the Court in *Texas State Teachers Assn. v. Garland Independent School District*, 489 U.S. 782, 109 S. Ct. 1486 (1989), for determining when a plaintiff can be said to be a "prevailing party" within the meaning of 42 U.S.C. § 1988.

Under *Garland*, the relevant issue is whether "the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.'" *Garland*, 109 S. Ct. at 1493 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).—*Garland* held that a plaintiff must clear two hurdles in order to make such a showing and thus establish entitlement to a fee award. First, "at a minimum, to be considered a prevailing party within the meaning of § 1988 the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Garland*, 109 S. Ct. at 1493. Second, a plaintiff meeting the first standard must also show that its success on a legal claim is not "so insignificant" as to be characterized as "purely technical" or "*de minimis*." *Id.*

Thus, Petitioners, by focusing solely on the fact of a \$1 nominal damages award in this case, are focusing on the wrong issue. An award of nominal damages may in some cases "change the legal relationship" between the parties to a lawsuit, but in other cases it may not. Similarly, an award of nominal damages in some cases could be characterized as a "purely technical" or "*de minimis*" success and in other cases could be precisely the relief being sought by the plaintiff. Observing that a plaintiff has recovered nominal damages is not a shortcut for performing the analysis prescribed by *Garland*.

The common law has long recognized that an award of nominal damages at times may represent nothing more than a technical victory for the plaintiff and at other times may represent a total victory. For example, the Restatement of Torts explained:

Nominal damages can be awarded in cases where a person has sought to recover substantial damages and has failed to prove substantial harm. Such damages can be awarded also where the plaintiff has not claimed compensatory damages but has sued only to

establish a right, to vindicate his reputation, or to obtain a ruling by a court that the defendant's conduct was tortious. Thus actions are frequently brought for non-harmful trespass to land to establish the plaintiff's right in the land or to prevent the creation of a presumptive right to cross the land. Similarly, actions may be brought to establish a right to a patent or a process, or to establish that the defendant's acts constitute tortious interference therewith.

Restatement of Torts § 907, comment b (1939). The Restatement of Torts 2d carried forward comment b virtually unchanged. Accordingly, that Petitioners obtained a \$1 nominal damages award in this case does not by itself establish their status as "prevailing parties."

**B. Petitioners Cannot Point to Any Benefit They Derived from This Case or to Any Changes in the Legal Relationship Between Themselves and Hobby**

Petitioners cannot be considered "prevailing parties" within the meaning of 42 U.S.C. § 1988 unless they obtain "some of the benefit" they sought in bringing suit. *Garland*, 109 S. Ct. at 1493. Yet, one searches Petitioners' brief in vain for any indication of what they believe they gained from the judgment in this suit. They did not obtain an order permitting the reopening of Artesia Hall or enjoining state officials from interfering with operations of the school in the future. They did not obtain a declaratory judgment that state officials had acted wrongly toward them. There was no judgment stating that state officials were wrong in believing that Artesia Hall was being operated in a substandard manner and therefore deserved to be shut down. Nothing in the judgment suggests that the jury can be said to have cleared the Farrar family name from allegations that led to the school's closure. All Petitioners can point to is an opaque jury finding that one of the state officials, Respondent Hobby, acted toward Petitioners in a manner that deprived

Joseph Farrar of an unspecified civil right but that the deprivation did not cause any injury. As a result of that finding, Petitioners were awarded \$1 of the \$17 million in damages they sought in this case. It simply is not plausible that the *de minimis* results actually achieved by Petitioners could be said to constitute "some of the benefits" they sought in bringing suit.

Nor can one seriously contend that the legal relationship between the parties has changed as a result of the \$1 judgment in this case. The judgment will have no effect on any future business dealings between Petitioners and state officials, or between Petitioners and Mr. Hobby. The ambiguity of the jury's interrogatory answers means that no one will be able to look to this case for guidance regarding how state officials in the future should deal with youth home operators accused of serious wrongdoing. When the only relief sought by a plaintiff is monetary relief and the jury decides that the plaintiff suffered zero damages at the hands of the defendant, the legal relationship between the parties cannot be said to have been altered by the judgment.

As the passage from the Restatement of Torts quoted above indicates, an award of nominal damages sometimes is all that a plaintiff is seeking in a lawsuit; for example, a plaintiff may sue for nominal damages to establish rights in a patent, even where he has suffered no monetary damages. A plaintiff bringing such a suit and obtaining a nominal damages award really can be said to have altered the legal relationship between the parties; a successful patent suit for nominal damages establishes the validity of the patent and the defendant's obligation to honor it. Such a plaintiff undoubtedly qualifies as a "prevailing party." But as the Restatement of Torts indicates, such a plaintiff is analytically distinct from the plaintiff seeking monetary relief alone and who is awarded nominal damages after failing to establish any real damages.

Petitioners' contention that the \$1 debt owed them by Mr. Hobby constitutes a change in their legal relationship

is an exultation of form over substance. The substance of the judgment in this case is a jury finding that Petitioners were not injured by Mr. Hobby's conduct; the \$1 in nominal damages was awarded solely in recognition of the jury's finding of a civil rights violation. The Court has made clear that where, as here, "[t]he only 'relief' [that the plaintiff has] received [is] the moral satisfaction of knowing that a federal court concluded that his rights had been violated," a plaintiff is not a "prevailing" party within the meaning of 42 U.S.C. § 1988. *Hewitt v. Helms*, 482 U.S. 755, 762 (1987).

Although *Hewitt* is potentially distinguishable on the grounds that the plaintiff in that case never received any judgment whatsoever, not even nominal damages,<sup>4</sup> the Court's subsequent decision in *Rhodes v. Stewart*, 488 U.S. 1, 109 S. Ct. 202 (1988), cannot be distinguished from this case in a similar fashion. The plaintiffs in *Rhodes* had obtained a valid declaratory judgment that prison officials had violated their rights by refusing them permission to subscribe to a magazine. The Court nonetheless found that the plaintiffs were not "prevailing parties" entitled to an attorney fee award because the declaratory judgment they obtained "afforded the plaintiffs no relief whatsoever": the plaintiffs were not still in prison at the time the judgment was entered and thus had no need for prison-approved magazine subscriptions. *Rhodes*, 109 S. Ct. at 203-204. In other words, *Rhodes* put to rest any argument that the mere entry of a formal judgment in one's favor is sufficient to establish one's status as a "prevailing" plaintiff under § 1988; prevailing party status also requires the plaintiff to make some showing that he has benefitted from the judgment.

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<sup>4</sup> The plaintiff in *Hewitt* brought a suit for money damages, alleging that prison officials had violated his due process rights by convicting him on misconduct charges on the basis of hearsay. Although a federal appeals court found that prison officials had acted improperly, judgment was entered for the prison officials on the basis of their qualified immunity from money damage claims. *Id.* at 758-759.

The notion that technical victories cannot support a fee award to the plaintiff is not a recent invention of the Court; indeed, it predates the adoption of 42 U.S.C. § 1988. For example, the Court stated in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), that when a stockholder's suit confers substantial benefit on the corporation and other stockholders, the plaintiff is entitled to recover his attorney fees from the corporation; but the Court noted that a benefit cannot be said to be "substantial" so as to merit a fee award if the judgment obtained by the stockholder is merely "technical in its consequence." *Mills*, 396 U.S. at 396 (quoting *Bosch v. Meeker Cooperative Light & Power Assn.*, 257 Minn. 362, 367, 101 N.W.2d 423, 427 (1960)). See also, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 688 n.9 (1983) ("we do not mean to suggest that trivial success on the merits, or purely procedural victories, would justify an award of fees under [fee-shifting] statutes" providing for an award of fees "when appropriate").

*Amicus* American Bar Association (ABA) argues against a rule that would permit fee awards based on some nominal damages judgments but not on others, contending that such a rule "would call upon the courts to make impossible judgment calls" and that "[t]here are no reliable standards" by which to assess whether a judgment is "merely technical." ABA Brief at 16-17. But the judgment calls decried by the ABA are precisely the types of decision-making mandated by this Court's decisions from *Mills* to *Rhodes*. It is no more difficult to determine whether a plaintiff has had any meaningful success in his lawsuit in the context of a nominal damages judgment than it is in the context of any other type of judgment.

Petitioners concede that the degree of their success in this litigation is relevant in determining a fee award; they argue, however, that their receipt of nominal damages gets them past the "prevailing party" hurdle and that the degree of their success only goes to the "reasonableness" of a fee award. Pet. Br. 11-12. Even if one were to accept Petitioners' analytical approach, they would still not be

entitled to a fee award. A "reasonable" fee for a party that sought only monetary damages, that succeeded in obtaining only \$1 of the \$17 million in monetary damages being sought, and that obtained at most a "technical" victory is zero dollars. *Amici* see no point in Petitioners' insistence that all plaintiffs who obtain nominal judgments should be deemed "prevailing parties," given that those whose nominal damages judgments cannot meet *Garland's* threshold test regarding what constitutes a "prevailing party" most certainly could not show that an award to them of any amount of attorney fees would be "reasonable." Moreover, bypassing the "prevailing party" issue and going straight to the reasonableness-of-the-fee issue would not make § 1988 fee cases any less analytically cumbersome for the courts, because courts -- when dealing with the reasonableness-of-the-fee issue -- would still be required to address whether the plaintiff has had any meaningful success in his lawsuit.

In sum, although there are instances in which a nominal damages judgment can be sufficient to trigger an award of attorney fees under § 1988, this is not such a case. Petitioners failed to obtain any of the benefits they sought in bringing suit and thus cannot be considered "prevailing" plaintiffs within the meaning of 42 U.S.C. § 1988.

## II. CONGRESS DID NOT INTEND TO CONFER "PREVAILING PARTY" STATUS ON EVERY PLAINTIFF WHO ESTABLISHES A CONSTITUTIONAL VIOLATION

Petitioners' argument that they are "prevailing parties" relies primarily on this Court's decision in *Carey v. Phipps*, 435 U.S. 247 (1978). Petitioners read too much into *Carey*.

*Carey* involved public school students who sued for monetary, declaratory, and injunctive relief based on claims that they had been suspended from school in violation of their procedural due process rights. The district court found a due process violation but denied all

relief in the absence of evidence that the students had been injured. *Carey*, 435 U.S. at 252. The court of appeals reversed, holding that the due process violation finding entitled the students to declaratory and injunctive relief, as well as recovery of substantial "nonpunitive" damages even in the absence of evidence that the students had been injured. *Id.* at 253. The Supreme Court reversed the court of appeals' holding regarding damages. The Court held that substantial nonpunitive damages could *not* be awarded in the absence of evidence of injury, but that "a denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Id.* at 267.

We note initially that *Carey* never dealt with the issue of when a plaintiff can be considered a "prevailing party" within the meaning of 42 U.S.C. § 1988. While it held that a plaintiff who can demonstrate a violation of his procedural due process rights is entitled to an award of nominal damages, it never suggested that all such plaintiffs are entitled to attorney fee awards.

Moreover, Petitioners' reading of *Carey* proves too much. Petitioners' argument -- that *Carey* held that "there are no *de minimis* constitutional deprivations" (Pet. Br. at 14) and thus that anyone who establishes constitutional deprivations qualifies as a "prevailing party" -- simply reads the Court's subsequent decisions in *Rhodes* and *Garland* out of the case law. The *Rhodes* plaintiffs, two inmates who obtained a declaratory judgment that prison officials had violated their constitutional rights to subscribe to magazines, were nonetheless held not to be "prevailing parties" because they failed to obtain any meaningful relief. *Rhodes*, 109 S. Ct. at 203-204. *Garland* stated that an "insignificant" or "technical" victory is "insufficient to support prevailing party status," even where the victory includes proving a constitutional violation. *Garland*, 109 S. Ct. at 1493. As an example of a constitutional violation that by itself would be too "insignificant" to confer prevailing party status, the Court cited a lower-court finding striking down as "overly

vague" a school district requirement that meetings between teachers and union representatives could be conducted on school premises during non-school hours only with the permission of the school principal; the Court noted that such permission had never been denied. *Id.* In sum, *Rhodes* and *Garland* make clear that Congress did not intend to confer § 1988 prevailing party status on every plaintiff who establishes that one of his constitutional rights was violated; the standards established by *Garland* for determining whether a plaintiff is a "prevailing party" are the same regardless whether the plaintiff's claims are constitutional or non-constitutional.

### III. A PLAINTIFF WHOSE PURPOSE IS TO VINDICATE A CONSTITUTIONAL PRINCIPLE SHOULD STATE THAT PURPOSE PLAINLY BY EXPRESSLY SUING FOR NOMINAL DAMAGES OR DECLARATORY JUDGMENT

A principal reason that the judgment in this case cannot be said to have altered materially the relationship between the parties is that it is essentially meaningless; no lessons can be learned from the judgment. The judgment fails to provide Mr. Hobby or other state officials with any guidance regarding where they went wrong in their treatment of Petitioners or how they can alter their future conduct to avoid depriving others of their civil rights.

Petitioners have only themselves to blame for the opaqueness of the judgment in this case. Had they sought a declaratory judgment or nominal damages, then the issues could have been framed to the jury in such a way as to permit the jury to state clearly how it believed that Petitioners' rights had been violated.<sup>5</sup> Petitioners should

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<sup>5</sup> For example, the jury could have been asked whether Mr. Hobby had violated any of Petitioners' civil rights and, if so, to specify what rights had been violated and the manner of the violation. Alternatively, the jury could have been asked whether specifically  
(continued...)

not be heard to complain about the denial of their prevailing party claim when the reason for that denial -- failure to obtain any meaningful relief -- may well have been a direct result of their failure to seek either nominal damages or declaratory judgment.

Moreover, an award of nominal damages is not by itself an indication of meaningful relief. Petitioners cite case law and treatises attesting to the importance accorded nominal damages judgments in past centuries. Pet. Br. 25-29. Petitioners fail to point out, however, that declaratory judgments were unavailable in this country before 1919,<sup>6</sup> and thus a suit for nominal damages was often the only way that an aggrieved party who had suffered no out-of-pocket loss could obtain a judgment declaring his rights. With the increased availability of declaratory judgments, suits for nominal damages have become less common in recent years. Today, nominal damages judgments are far more likely than in centuries past to result from a failed

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<sup>5</sup> (...continued)

enumerated acts of Mr. Hobby had violated Petitioners' procedural due process rights. Instead, because Petitioners sought only monetary relief (which was denied by the jury), we are consigned to guessing what the jury meant when it said -- during the course of rejecting all of Petitioners' requested relief -- that Petitioners' civil rights had been violated. Presumably, the jury was indicating that Mr. Hobby had not accorded Petitioners all procedural protections due them during the course of proceedings to revoke Petitioners' license to operate Artesia Hall. But one cannot infer from the jury's interrogatory answers that the license revocation was wrongful or that Petitioners were denied any more than one of the scores of procedural due process protections mandated by the Due Process Clause. Indeed, the failure of the jury to award any damages to Petitioners is a good indication that the jury believed that the violations of Petitioners' civil rights were trivial.

<sup>6</sup> See generally, Wright, Miller, & Kane, *Federal Practice and Procedure: Civil 2d* § 2752 at 571 (1983). Declaratory judgments were not available in the federal courts until 1934 with the adoption of the Federal Declaratory Judgment Act (Act of June 14, 1934, c. 512, 48 Stat. 955), which followed this Court's decision in *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933), that federal courts had constitutional authority to issue declaratory judgments.

attempt to obtain a monetary award than from a genuine desire to obtain a declaration vindicating one's legal rights. A litigant in the latter position has achieved a victory that merits an attorney fee award. In contrast, there is no indication that Congress intended to hand out fee awards to Petitioners and similarly situated litigants who have failed in their efforts to win monetary damages and who can point only to a meaningless nominal damages award.<sup>7</sup>

In sum, Petitioners' pleadings made clear their sole object in this lawsuit: a monetary award. They failed in that effort and should not now be heard to complain that they are nonetheless entitled to an attorney fee award based on a nominal damages award that -- due to Petitioners' consciously chosen litigation strategy -- is devoid of all meaning.

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<sup>7</sup> A plaintiff who obtains a declaratory judgment almost surely qualifies as a "prevailing party" under 42 U.S.C. § 1988, because an award of declaratory relief is discretionary with a district court (*Hewitt*, 482 U.S. at 762), and a court is likely to deny declaratory relief to a plaintiff who has demonstrated no more than a technical violation of his rights. In contrast, the Fifth Circuit in this case interpreted *Carey* as requiring entry of a nominal damages award in all cases in which a constitutional violation is found. Pet. App. 10. Accordingly, when a plaintiff who has obtained a nominal damages award seeks § 1988 "prevailing party" status, it becomes necessary to apply the *Garland* test to determine whether the plaintiff has obtained any meaningful relief.

**CONCLUSION**

*Amici curiae* Washington Legal Foundation, U.S. Representative Henry Hyde and Joe Barton, and the Allied Educational Foundation respectfully request that the judgment below be affirmed.

Respectfully submitted,

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